Filed 10/17/16 P. v. McKinney CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE, Plaintiff and Respondent, v. ALONZO MCKINNEY, Defendant and Appellant.	C081334 (Super. Ct. No. CH019390)

"On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 created a resentencing provision, codified at Penal Code section 1170.18,[1] which provides that a person currently serving a sentence

[1] Undesignated statutory references are to the Penal Code.

for certain designated felonies may petition for recall of the sentence to reduce the felony to a misdemeanor. Defendant Alonzo McKinney appeals from an order denying his petition to reduce his commitment conviction from a felony to a misdemeanor.

Defendant's motion was denied upon a determination that he was not eligible for relief because the commitment offense was a violation of section 4501.5, battery on a nonconfined person by a confined person, which is not among the eligible offenses listed in section 1170.18.

Counsel was appointed to represent defendant on appeal. Counsel filed an opening brief setting forth the facts of the case and requesting this court to review the record and determine whether there were any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Counsel advised defendant of his right to file a supplemental brief within 30 days of the date of filing of the opening brief. Upon defendant's request, time to file a supplemental brief was extended. The extended period has expired, and defendant submitted a document entitled, "Motion for Lie Detector Test," which has been construed to be a supplemental brief.

Whether the protections afforded by *Wende* and the United States Supreme Court decision in *Anders v. California* (1967) 386 U.S. 738 [18 L.Ed.2d 493] apply to an appeal from an order denying a petition brought pursuant to Proposition 47 remains an open question. Our Supreme Court has not spoken. The *Anders/Wende* procedures address appointed counsel's representation of an indigent criminal defendant in the first appeal as a matter of right and courts have been loath to expand their application to other proceedings or appeals. (See *Pennsylvania v. Finley* (1987) 481 U.S. 551 [95 L.Ed.2d 539]; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *In re Sade C.* (1996) 13 Cal.4th 952; *People v. Kisling* (2015) 239 Cal.App.4th 288; *People v. Serrano* (2012) 211 Cal.App.4th 496; *People v. Dobson* (2008) 161 Cal.App.4th 1422; *People v. Taylor* (2008) 160 Cal.App.4th 304; *People v. Thurman* (2007) 157 Cal.App.4th 36; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570.) Nonetheless, in the absence of Supreme

Court authority to the contrary, we will adhere to *Wende* in the present case, where counsel has already undertaken to comply with *Wende* requirements and defendant has filed a supplemental brief.

As best we can glean from the contents of defendant's supplemental brief, he seeks to submit both himself and the victim of the commitment offense to lie detector tests. Hence, the supplemental brief can only be read as presenting a challenge to the validity of the commitment judgment. " ' "It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute." ' [Citations.]" (*People v. Mena* (2012) 54 Cal.4th 146, 152.) Appeal of the order denying relief sought pursuant to Proposition 47 is authorized by subdivision (b) of section 1237, as an order made after judgment, affecting the substantial rights of defendant. (Cf. *Teal v. Superior Court* (2014) 60 Cal.4th 595, 600-601.) However, that statutorily conferred appellate jurisdiction is limited to review of the decision to deny relief under Proposition 47. To convert that limited grant of jurisdiction to effectuate appellate review of the commitment judgment would in substance allow a belated motion to vacate that judgment, thereby violating the proscription on "bypass[ing] or duplicat[ing] appeal from the judgment itself.' [Citation.]" (*People v. Totari* (2002) 28 Cal.4th 876, 882.) Defendant's challenge to the commitment judgment is not cognizable on this appeal of the order denying relief sought pursuant to Proposition 47.[2]

Having undertaken an examination of the record, we find no arguable error that would result in a disposition more favorable to defendant.

---

[2] Parenthetically, we note that defendant pleaded guilty to the commitment offense and therefore has " ' "admitt[ed] every element of the offense charged . . . , all allegations and factors comprising the charge contained in the pleading. . . ." ' " (*Sanchez v. Superior Court* (2002) 102 Cal.App.4th 1266, 1269, quoting *People v. Palacios* (1997) 56 Cal.App.4th 252, 257.)

DISPOSITION

The judgment (order) is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

MAURO, J.